In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this cause, found at 529 F.2d 1133, appears at page A-11 of the Appendix. The opinion of the United States District Court for the Western District of Oklahoma, found at 542 F.Supp. 243, appears at page A-7 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment in this case on February 14, 1979. Application for Extension of Time to File a Petition for a Writ of Certiorari was made by the Petitioner and was granted on May 16, 1979, extending the time to June 14, 1979. The Petition for Writ of Certiorari was filed on June 14, 1979, and this Court granted certiorari on October 1, 1979 and evoking the jurisdiction under 28 U.S.C. 1354(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 3:

> "*Commencement of Action* — A civil action is commenced by filing a complaint with the Court."

Oklahoma Statutes Annotated, Title 12, Sec. 97 (West Supp. 1978):

> "An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the time of the summons which is served on him or a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commecement thereof, within the meaning of this article, when the parties faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procurred by mailing, by a receipt of certified mail containing summons within sixty (60) days."

STATEMENT OF THE CASE

On August 22, 1975, the Petitioner, Fred N. Walker, was injured. On August 19, 1977, the Petitioner filed a complaint in the United States District Court for the Western District of Oklahoma against the Respondent seeking damages for personal injuries alleging a defect in a manufactured product of the Respondent. Summons was also issued on that date. On December 1, 1977, ARMCO Steel Corporation was served with process and on January 5, 1978, the Respondent filed a Motion to Dismiss for the reason that the action was barred by the applicable state statute of limitations. The Honorable Ralph Thompson sustained the Order to Dismiss on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision.

SUMMARY OF ARGUMENT

In an action brought in Federal Court, jurisdiction being based on diversity of citizenship between the parties, state statute of limitations, in this case, the Oklahoma statutes (12 O.S. 1971, Sec. 91, *et seq.*) are controlling as the substantive law to be followed by the Federal Courts. The particular section in question is not, as the Petitioner argues, in conflict with Rule 3 but merely sets a fixed limit on how long the statute of limitations is to be tolled, and that *Ragan* v. *Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, controls.

ARGUMENT AND CITATION OF AUTHORITY

Since this Court abandoned the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, 10 L.Ed. 865, in the case of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, and 82 L.Ed. 1188. Federal Courts sitting in cases based upon diversity of citizenship of the parties, have had to apply the state substantive law in dealing with those cases, while applying a uniform federal procedure that governed how those cases would progress to a conclusion. In this matter the Respondent would ask that this Court do exactly that.

There is certainly little doubt that the Federal Courts are bound to follow the limitations of actions set up by the State Courts and that these limitations are substantive in nature. Under various state schemes as well as under the federal scheme there are ways where statutes of limitations may be tolled once the action is timely commenced. Under the law of the State of Oklahoma as announced in 12 O.S. 1971, Sec. 97, there is a limitation as to how long the statute may be tolled even if timely commenced. That period is sixty days. The Oklahoma Supreme Court in the case of *Lake* v. *Lietch*, 550 P.2d 935, in construing that section, noted that there were no statutes of limitations at common law and that, once enacted and made a part of the statute of limitations, those provisions must be strictly construed and cannot be enlarged upon consideration of inconvenience. And that any exceptions to the strict mandates of the statute of limitations must be contemplated within the statute itself.

The Respondent does not contend that the action was not timely commenced for the Petitioner complied both

with Rule 3 of the Federal Rules of Civil Procedure and the dictates of the applicable Oklahoma statute. In fact, the summons is contained in the Appendix at page A-5, and on its face it shows issuance as of August 19, 1977, and further that it was not delivered unto the Marshal's hand until 11:34 A.M., December 1, 1977, or some one hundred and four days later. It is the position of the Respondent that the commencement was effective in tolling the statute for only sixty days through the dictates of 12 O.S. 1971, Sec. 97. A specific time limit has been set by the Legislature of the sovereign State of Oklahoma and approved in the above cited case of *Lake* v. *Leitch*, supra. Further, the United States District Court for the Western District of Oklahoma in cases other than this have recognized that Sec. 97 is an integral part of the other sections dealing with the limitations of actions. See: *Dial* v. *Ivey*, 370 F. Supp. 833 (E.D. Okl., 1974); *Nichols* v. *Eli Lilly*, 501 F.2d 392 (C.A. Okl., 1974). There is no doubt that the Federal Courts would not invade the province of the State Legislature and State Court to say that the appropriate time period for bringing an action, not arising out of contract, within the borders of the State of Oklahoma should not be two years and it is the position of the Respondent that, likewise, the sovereign State of Oklahoma should have the prerogative to set a time, in this case sixty days, as a maximum for which the two-year statute may be tolled to allow the plaintiff in an action, to give a defendant notice of an alleged cause of action for which it is being sued. It was exactly that sixty days provisions that the Oklahoma Supreme Court said must be strictly construed. Further, in the United States Court of Appeals for the Third Circuit,

in the case of *Witherow* v. *Firestone Tire and Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976), it was aptly noted that:

> "The nub of the policies that underlies *Erie R. Co.* v. *Thompkins* is that for the same transaction the accident of a suit by non-resident litigant at a Federal Court instead of a State Court a block away, should not lead to a substantially different result. While we avoid mechanical application of the 'outcome determinative' test, or any other single test, we observe that nothing could be more 'substantial' than to allow an action to proceed in Federal Court which would be time barred in the State Court."

The Petitioner argues that this case parallels and should be controlled by *Hanna* v. *Plumer*, 380 U.S. 460 (1965). A close examination reveals that such should not be the case. *Hanna* v. *Plumer* dealt with the method by which service was effected upon a defendant. In the case at bar the Respondent received no notice of any type within the time prescribed by Sec. 97. Further, *Hanna* was decided primarly in evaluating the service provisions of the state in comparison to Section 4 of the Federal Rules of Civil Procedure.

Likewise, the plaintiff has cited numerous cases which he contends are applicable and instructive in this matter. However, careful reading of all of the cases shows that in not one instance did the facts parallel the case at bar. In *McCray* v. *General Motors Corp.*, 53 F.R.D. 384 (D. Mont. 1971) and *Newhart* v. *George F. Hellick Coffee Co.*, 325 F.Supp. 1047 (E.D. Pa., 1971), the controlling fact was the lack of due diligence in procuring service and, in both cases, due diligence was not found and the position of the defendants was sustained. In *Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978) and *Newman* v. *Freeman*, 262 F.Supp. 106, (E.D. Pa., 1966), involved the addition of causes of action and amendments to complaints after an action had been properly commenced and the defendants served. Also, in *Newman*, supra, the state law was followed. In *Alford* v. *Whitsel*, 52 F.R.D. 327 (N.D. Miss., 1971), the facts were distinguished from those in *Ragan* specifically by the Court. The Court in *Smith* v. *Peters*, 482 F.2d 799 (6th Cir. 1933), distinguished this case, in that service was made within the Michigan statute of limitations specifically but then the cause was transferred to Kentucky by the Court and a new summons was issued outside the statute. There obviously the defendant had received service of summons within the statute of the initial state in which the action was brought. *Dubosky* v. *United States*, 294 F.Supp. 421 (D.Wyo., 1968), was a case when an attempt at service was made within the statute, returned not found, and shortly thereafter served properly. Also, it must be noted, that *Dubosky* is not followed with favor within the Tenth Circuit, within which, it lies. The Petitioner in its quote from the case of *Wheeler* v. *Standard Tool and Manufacturing Co.*, 311 F.Supp. 1177 (S.D.N.Y., 1970), chose not to include within that quote a statement by the Court that

> ". . . that the circumstance here, while distinguishable from those in *Ragan* . . ."

and also the attendant note:

> "3. *Ragan* was based on the principal that the cause of action 'created' by Kansas law should also be governed by Kansas law. Here, however, the cause of action arose in Connecticut, not New York."

The Respondent would urge that that distinction, as well at the omitted quote, are quite significant in this case. Of course, in the case at bar, the right sought to be enforced was created under the laws of the State of Oklahoma.

Further, the Petitioner seems to infer that Judge Doyle of the Tenth Circuit reluctantly sustained the trial court in the opinion below. It will be well to note that Judge Doyle, in a later opinion, *Rose* v. *K. K. Masutoku Toy Factory Co.*, 597 F.2d 215 (1979), declared *Ragan* had originated from the Tenth Circuit and pronounced it still as good law, as he had confirmed in this case below. Further, Judge Logan of the United States Court of Appeals for the Tenth Circuit has, in Judge Doyle's view, offered very well reasoned defense of *Ragan* and distinguished it from *Hanna,* in its application, when discussing the dichotomy between procedure and substance in the case of *Lindsey* v. *Dayton-Hudson Corp.*, 592 F.2d 1118 (1979), by saying:

> "On its face, service of process would seem procedural in the traditional sense. Whether the case commences upon filing or issuance of summons would not appear to have any significant effect upon forum shopping. But it certainly affects the outcome here whether summons must be issued before the end of the statute of limitations. And arguably notification of the defendant is an important purpose of the statute of limitations, and if he has not been served there is little difference to him whether the case has been filed or the case has not been filed." *Lindsey* v. *Dayton-Hudson Corp.*, supra.

Arriving at this conclusion, the Judge noted that 12 O.S. 1971, Sec. 97 was an integral part of the Oklahoma Statutes' Chapter on Limitation of Actions and was not a

service provision. The Tenth Circuit is certainly not alone in its view and besides *Witherow* v. *Firestone and Rubber Co.*, supra, in the Third Circuit, others are in accord, see: *Anderson* v. *Papillion,* 445 F.2d 841 (5th Cir., 1971); *Groninger* v. *Davison,* 364 F.2d 638 (8th Cir., 1966), and *Sylvester* v. *Messler,* 351 F.2d 472 (6th Cir., 1965), *cert. denied* 382 U.S. 1011, 86 S.Ct. 619, 15 L.Ed.2d 526. Nearly all those courts, along with the Tenth Circuit, who have upheld the *Ragan* view, and its distinction from *Hanna,* have been supported by leading commentators on the distinction. Further, the commentators note that the problem in *Ragan* is not contemplated by the Federal Rules of Civil Procedure however, the qeustion in *Hanna* is directly covered by the rules.

> "There is some substance to the distinction offered in *Hanna,* particularly in the notion that Rule 3 does not deal with particular problem raised in Ragan. By way of contrast, Rule 4 (d) (1) directly covers the situation presented in Hanna. Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the Rule does not state that filing tolls the statute of limitations. Thus, Ragan and similar cases may still be read as holding that Rule 3 does not determine or measure the point at which certain State created rights are extinguished and that this conclusion is uneffected by *Hana.*" (Emphasis added) 4 Wright and Miller, *Federal Practice and Procedure:* Civil Sec. 1057 at 190-191 (1969).

Of course, the Petitioners argument is based in the view that Rule 3 and Section 97 are in direct conflict; the Respondent firmly disagrees with this concept. In fact, the

Petitioner commenced his action timely as to toll the statute of limitations by having summons issued on the day he filed his complaint. But there was a total failure to comply with the further dictates of Section 97 and the summons, once issued, was not delivered to the Marshal or served for one hundred and four days, clearly outside the time-limiting provisions of Section 97, or sixty days. The Respondent would offer no explanation for the Petitioner why service was not effected for the record before this Court is devoid of any activity between August 19, 1977 and December 1, 1977. But, once delivered to the Marshal, service was promptly effected.

CONCLUSION

The Petitioners, as well as others that have taken his view, have had, as a basis for their opinion, that uniformity and ease of interpretation across the United States and all Federal Courts was the deciding and crucial factor. The Respondent submits that respect for the States' right to create rights and control their enforcement is a paramount consideration. Mr. Justice Brandeis, in *Erie R. Co.* v. *Thompkins,* supra, seemed to be more impressed with the States' right than with uniformity when he stated:

> "There is no Federal general common law. Congress has no power to declare substantive rights of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts."

Mr. Justice Brandeis went on to quote Mr. Justice Holmes when he stated:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that State without regard to what it may have been in England or anywhere else . . . the authority and only authority is the state, and if that be so, the voice adopted by the state as its own (whether it be of its legislature or of its Supreme Court), should utter the last word." *Kuhn* v. *Fairmont Coal Co.,* 215 U.S. 349, 30 S.Ct. 140, 54 L.Ed. 228.

Further, Mr. Justice Frankfurter commented on the deference that should be afforded to the state law in diversity cases dealing with state-created rights in *Guaranty Trust Co. of New York* v. *York,* 326 U.S. 99, by stating:

> ". . . Since a Federal Court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the state, it cannot afford recovery if the right to recover is made unavailable by the state nor can it substantially affect the enforcement of the right as given by the state."

He went on to say at page 110 that:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a Federal court in a diversity case should follow the State law." *Guaranty Trust Co. of New York* v. *York,* supra.

The Respondent would respectfully submit that the pronouncements above are still quite applicable. An action, time barred in State Court should likewise be barred in a Federal Court when jurisdiction is based upon diversity of citizenship. In the instant case there was *no* attempt to get service nor was there any unauthorized service.

It is simply and purely a question of time and the application of the statute of limitations found in 12 O.S. 1971, Sec. 97, as enacted by the Oklahoma Legislature. This case does not involve, like *Hanna*, the question of who in the household is served or whether in-hand service was effected, but the fact that no service whatsoever was made or received until outside the specific dictates of 12 O.S. 1971, Sec. 97.

The Petitioner in this case is a resident of the State of Oklahoma (Appendix, p. A-1) and not a foreign citizen seeking to enforce his rights within the boundaries of the State of Oklahoma. He voluntarily chose to avail himself of the Federal Courts through a diversity action, to attempt to recover upon the cause of action alleged in the complaint. Had he availed himself of his own State Court which serves and protects him through his own duly elected representatives and proceeded in the manner followed in the Federal court, *his case would have been barred.* The Respondent submits that the Petitioner's rights may not be

enlarged, nor those of the Respondent lessened, by where the action was filed.

Respectfully submitted,

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